Washington and Northern Idaho District Council of Laborers and Skanska USA Building, Inc.[1] ***and*** **Operative Plasterers and Cement Masons International Association, Local 528.** Case 19–CD–211263

August 16, 2018

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS PEARCE AND KAPLAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Employer Skanska USA Building, Inc. (the Employer) filed an unfair labor practice charge on December 8, 2017,[2] alleging that the Respondent, Washington and Northern Idaho District Council of Laborers (Laborers), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Operative Plasterers and Cement Masons International Association, Local 528 (Cement Masons). A hearing was held on March 21, 2018, before Hearing Officer John Fawley. Thereafter, the Employer, Laborers, and Cement Masons filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a Delaware corporation engaged as a general contractor in the building and construction industry with a place of business located in Seattle, Washington. During the past year, the Employer provided services in excess of $50,000 directly to entities located outside the State of Washington. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Laborers and Cement Masons are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a general contractor in the building and construction industry and is signatory to collective-bargaining agreements with five unions, including Laborers and Cement Masons. As the general contractor on a construction project at the Life Sciences Building at the University of Washington, the Employer needed to perform several jobs, including installing resinous flooring (the disputed work) in the lab. Because the University of Washington is a public entity, State law requires that a subcontract bid package shall be awarded to the lowest qualified bidder. The lowest responsive bid for the resinous flooring work was submitted by the Leewens Corporation (Leewens), and it was therefore awarded the work. The Leewens employees who began performing the disputed work on approximately September 27, 2016, were represented by Laborers. Leewens and the Employer have entered into a number of project agreements during the last 10 years whereby epoxy and resinous flooring work has been performed by employees represented by Laborers.

On July 17, a telephone conversation occurred between Cement Masons' business agent, Justin Palachuk, and the vice president of Leewens, Patrick Leewens. The substance of the conversation is in dispute. According to Patrick Leewens, Palachuk claimed the disputed work for Cement Masons based on a ruling from the state Department of Labor and Industries (L&I)[4] and the fact that Cement Masons uses the equipment required to perform the disputed work. Patrick Leewens informed Palachuk that Leewens had performed this type of work for years using employees represented by Laborers and that he would continue employing Laborers for the Life Sciences project. Afterwards, Patrick Leewens sent an email to the Employer recounting his recollection of the phone conversation with Palachuk. Palachuk testified that he never claimed the disputed work for Cement Masons but, rather, that he had asked Patrick Leewens about the scope of the work and what tools were being used.

Cement Masons subsequently filed a grievance alleging that the Employer had breached the subcontracting clause in its collective-bargaining agreement with Cement Masons by subcontracting the disputed work to Leewens. Upon learning of the grievance, Laborers notified the Employer that it was prepared to use all means necessary, including picketing and economic action, to

[1] The name of the Employer appears in the caption as amended at the hearing.

[2] All dates are in 2017 unless otherwise indicated.

[3] Member Emanuel is recused and took no part in the consideration of this case.

[4] On April 27, Cement Masons sent the Employer a letter generally claiming various classes of work, including "floor coating," based on certain prevailing wage determinations made by L&I.

ensure that the Employer continued to assign the disputed work to employees represented by Laborers.

The work is approximately 95 percent complete. In a letter to Leewens just prior to the originally scheduled 10(k) hearing date,[5] Cement Masons disclaimed the disputed work, but it did not withdraw its grievance, which is scheduled for arbitration.

B. Work in Dispute

The parties stipulated that the disputed work is correctly identified in the notice of hearing as "[t]he installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington."

C. Contentions of the Parties

The Employer and Laborers contend that there are competing claims for the work in dispute. They also assert that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated in light of the threat by Laborers to take adverse action against the Employer, including picketing and economic action, concerning the assignment of the resinous flooring work at the Life Sciences Building. They further contend that the work in dispute should be awarded to the employees represented by Laborers based on the factors of employer preference and past practice, relative skills and training, area and industry practice, and economy and efficiency of operations.

Cement Masons contends that it has not made a claim for the resinous flooring work. Relying on *Laborers* (*Capitol Drilling Supplies*), 318 NLRB 809 (1995), it argues that it has merely pursued a contractual grievance against the Employer for failing to honor the subcontracting clause in the collective-bargaining agreement. Cement Masons further argues that this dispute involves a representational issue, not a jurisdictional issue. Additionally, Cement Masons contends that the notice of hearing should be quashed because the threats to picket were not authentic but rather were made by Laborers, in collusion with the Employer, in order to fabricate a jurisdictional dispute. Finally, Cement Masons argues that even if it made a claim for work, it properly and effectively disclaimed interest in the disputed work.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. *Operating Engineers Local 150* (*R&D Thiel*), 345 NLRB 1137, 1139 (2005). We find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its letters from its business manager, Jermaine Smiley, to the Employer objecting to any assignment of the resinous flooring work to Cement Masons–represented employees. In addition, "[its] performance of the work indicates that [it claims] the work in dispute." *Sheet Metal Workers Local 54* (*Goodyear Tire & Rubber Co.*), 203 NLRB 74, 76 (1973); see also *Operating Engineers Local 513* (*Thomas Industrial Coatings*), 345 NLRB 990, 992 fn. 6 (2005) (citing *Laborers Local 79* (*DNA Contracting*), 338 NLRB 997, 998 fn. 6 (2003)).

We also find, despite its claims to the contrary, that Cement Masons has claimed the disputed work. We find no merit in the contention that, under *Capitol Drilling*, it made no claim to the disputed work because it merely filed a subcontracting grievance against the Employer, the general contractor. In *Capitol Drilling*, supra, 318 NLRB at 811–812, the Board found that a jurisdictional dispute arises when a union seeking enforcement of a contractual claim both pursues its contractual remedies against the general contractor with which it has an agreement and makes a claim for the work directly to the subcontractor that has assigned the work. Id. at 809. There is reasonable cause to believe that Cement Masons did precisely that here.

Cement Masons made a claim for the resinous flooring work directly with the subcontractor, Leewens, as well as with the general contractor, the Employer. During a phone conversation, Palachuk informed Patrick Leewens that L&I had assigned the work to Cement Masons and that Cement Masons claimed all work requiring the tools used in the disputed work, specifically rollers, squeegees, cover trowels and other trowels. The subsequent email from Patrick Leewens to the Employer, stating that Palachuk informed him that L&I had assigned the disputed work to Cement Masons, corroborated his testimony that Palachuk claimed the work. Although Cement Masons disputes this testimony, we find that it is sufficient to establish reasonable cause to believe that Cement Masons made a claim for the disputed work directly with Leewens. *Electrical Workers Local 71* (*US Utility Contractor Co.*), 355 NLRB 344, 346 (2010) (citing *J.P. Patti Co.*, 332 NLRB 830, 832 (2000)) (finding that in

[5] The hearing, originally noticed for January 25, was held on March 21.

10(k) proceedings, a conflict in testimony does not prevent the Board from finding reasonable cause and proceeding with a determination of the dispute).

We also find no merit in the assertion that no claim for work occurred because this involved a representational issue, not a jurisdictional issue. Cement Masons has failed to provide any evidence that it sought to represent the Leewens employees at issue. Therefore, this is not a dispute about which of two competing unions will represent a single group of workers currently performing work and instead involves an attempt by one group of employees to take a work assignment away from another group of employees. For that reason, this dispute is jurisdictional, not representational. *DNA Contracting*, supra, 338 NLRB at 999; cf. *Carpenters Local 275* (*Lymo Construction Co.*), 334 NLRB 422, 424 (2001) (unlike situation here, dispute found to be representational because composite crew from both unions was used by the employer until the completion of the job).

Finally, we find no merit in the contention that Cement Masons has sufficiently disclaimed interest in the disputed work. On January 18, 2018, the eve of the original 10(k) hearing date, Cement Masons wrote Leewens saying that it was not seeking the disputed work. Cement Masons, however, has continued to pursue its grievance against the Employer. We find that the continuance of the grievance is inconsistent with any assertion of a disclaimed interest in the work and that Cement Masons' attempted disclaimer is ineffective as it is not a true renunciation of interest in the work. *Plumbers District Council16* (*L&M Plumbing*), 301 NLRB 1203, 1204 (1991).

2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As set forth above, Business Manager Smiley wrote the Employer stating that Laborers would use all means necessary, including picketing and economic action, to ensure that the Employer continued to assign the resinous flooring work to members of Laborers. These statements constitute threats concerning the assignment of the resinous flooring work, and the Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. See, e.g., *Operating Engineers, Local 150* (*Patten Industries*), 348 NLRB 672, 674 (2006).

Further, we find no merit in the assertion that the Employer has colluded with Laborers to create a sham jurisdictional dispute. The Board has consistently rejected this argument absent "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *Operating Engineers Local 150* (*R&D Thiel*), supra, 345 NLRB at 1140. There is no evidence on this record that the written threats to strike or picket over the assignment of the disputed work were the result of collusion with the Employer or were otherwise not genuine.

3. No voluntary method for adjustment of dispute

The parties stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for the voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212* (*Columbia Broadcasting*), 364 U.S. 573, 577–579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743* (*J.A. Jones Construction*), 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.[6]

1. Board certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employer is signatory to collective-bargaining agreements with both Laborers and Cement Masons. Both agreements contain a craft classification that incorporates epoxy work.[7] We find that the language in each of these contracts covers the work in dispute. Leewens does not have a collective-bargaining agreement with either Laborers or Cement Masons.

Accordingly, the factor of board certifications and collective-bargaining agreements does not favor an award to either group of employees.

[6] Cement Masons argues that there is no jurisdictional dispute warranting a Board determination. It does not alternatively argue that, if the Board disagrees, employees it represented should be awarded the work under the Board's multifactor test, nor did it introduce evidence relevant to those factors.

[7] Both the Employer and Laborers confirmed at the hearing that Laborers' "Epoxy Technician" classification pertains to the resinous flooring coating work on the Life Sciences project.

2. Employer preference, current assignment, and past practice

The Employer assigned the disputed work, via Leewens, to employees represented by Laborers, and both the Employer and Leewens prefer that the work in dispute continue to be performed by employees represented by Laborers. In addition, the Employer testified that assignment of this work to Laborers-represented employees is consistent with its past practice. Between 2010 and 2017, 42 out of 47 resinous flooring projects were awarded by the Employer to Laborers-affiliated subcontractors, and since 2014, 30 out of 31 of the Employer's resinous flooring projects have utilized Laborers. Furthermore, Leewens almost exclusively uses Laborers-represented employees for epoxy floor coating work.

We find, therefore, that the factor of employer preference, current assignment, and past practice favors an award of the work in dispute to employees represented by Laborers.

3. Industry and area practice

The Employer and Laborers argue that industry and area practice supports an award of the disputed work to employees represented by Laborers. Dale Cannon, business agent for Laborers Local 242, testified that area competitors use Laborers-represented employees to perform resinous flooring work. Foreman Larry Vance, of Leewens, also testified that he was not aware of Seattle-area floor coating companies using any craft but Laborers.

We find that on this record this factor favors an award of the work in dispute to employees represented by Laborers.

4. Relative skills

The evidence presented at the hearing demonstrates that the employees represented by Laborers possess the required skills and training to perform the disputed work and have performed this type of project in the past. Vance testified that Laborers available to perform the disputed work have been trained in the general aspects of floor coating and in installing methyl methacrylate (MMA) in particular, which is the resinous coating being used on the Life Sciences project. MMA requires certification training on proper installation and safety hazards. No evidence was presented concerning the skills of the employees represented by Cement Masons. Accordingly, we find that on this record this factor favors awarding the disputed work to employees represented by Laborers.

5. Economy and efficiency of operations

Representatives of the Employer testified that it is more efficient and economical to assign the disputed work to employees represented by Laborers because the installation is 95 percent completed. One of the Employer's project executives, Lewis Guerrette, testified that replacing Laborers with Cement Masons would disrupt the project schedule because Cement Masons would be required, pursuant to specification requirements, to produce a mockup of the resinous coating they would install, which would need to be approved by the architect and University of Washington representatives.

We therefore find this factor favors an award of the disputed work to employees represented by Laborers.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, current assignment, and past practice; industry and area practice; relative skills; and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Leewens Corporation, represented by Washington and Northern Idaho District Council of Laborers, are entitled to perform the installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington in Seattle, Washington.

Dated, Washington, D.C. August 16, 2018

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John F. Ring, Chairman

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Mark Gaston Pearce, Member

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD